

September 30, 2004

BIDDEFORD INTERNET CORP. d/b/a GREAT
WORKS INTERNET
Rapid Response Complaint (08/12/04)
Regarding OC-3 Dedicated Transport

NOTICE OF INVESTIGATION

WELCH, Chairman; DIAMOND and REISHUS, Commissioners

I. SUMMARY

In this Notice, we open an investigation, pursuant to 35-A M.R.S.A. § 1303(2) and Sections 252 and 271 of the Telecommunications Act of 1996 (TelAct), into the August 12, 2004 Rapid Response Complaint of Biddeford Internet Corp. d/b/a Great Works Internet (GWI) relating to the terms and conditions under which Verizon-Maine (Verizon) must provide OC-3 Dedicated Transport.

II. BACKGROUND

On August 12, 2004, GWI filed a complaint under the Commission's Rapid Response Process alleging that Verizon had rejected GWI's orders for OC-3 unbundled network elements (UNEs). GWI alleged that Verizon had stated that it was Verizon's policy not to provision OC-3 lines as a UNE but only as special access. GWI argued that Verizon was obligated under the terms of its Interconnection Agreement with GWI to continue provisioning OC-3 UNEs pursuant to section 271 of the TelAct. GWI also claimed that Verizon "is or should be" required to provide access to OC-3 UNES pursuant to 35-A M.R.S.A. §§ 301 and 304. GWI asked the Rapid Response Process Team (RRPT) to make a preliminary finding requiring Verizon to provision the OC-3 UNEs.

On August 16, 2004, Verizon filed its written response to GWI's complaint. Verizon claimed that the Federal Communications Commission (FCC) had removed OC-3 transport from the list of UNEs that must be provided under Section 251 of the TelAct in its *Triennial Review Order*.¹ Verizon further alleged that it had provided proper notice under GWI's Interconnection Agreement that Verizon would cease providing OC-3 UNEs. Citing sections 4.7 of the Interconnection Agreement and 1.1 of the Network Elements Attachment, Verizon alleged that the *TRO* constituted a change in the "Applicable Law," that it was no longer required to provision OC-3 UNEs, and that

¹Report and Order and Order on Remand and Further Notice of Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket 96-98 *et al.*, FCC03-36, 18 FCC Rcd 16978 (rel. August 21, 2003)(*Triennial Review Order* or *TRO*)

any arguments concerning its obligations under Section 271 of the TelAct or state law were premature.

GWI responded to Verizon by contesting Verizon's interpretation of the "Applicable Law" language contained in the Interconnection Agreement. GWI argued that the Interconnection Agreement did not limit the term "Applicable Law" to Section 251 of the TelAct but instead included Section 271 of the TelAct and state law.

On August 17, 2004, the RRPT held a conference call with the parties. After a lengthy discussion of the merits of the complaint, all parties agreed that it would be best to wait until the Commission issued its Part II Order in the Wholesale Tariff Proceeding, Docket No. 2002-682, before determining the next steps.

On September 3, 2004, we issued our Part II Order in the Wholesale Tariff proceeding. Of particular importance to this proceeding is our determination regarding Verizon's continuing obligations under Section 271 of the TelAct with respect to network elements and both the interim and long-term pricing of those elements. We found:

Until such time as we approve new rates for section 271 UNEs, adopt FCC-approved rates, or CLECs agree to section 271 UNE rates, Verizon must continue to provide all section 271 UNEs at existing TELRIC rates. We find this requirement necessary to ensure a timely transition to the new unbundling scheme. We have no record basis to conclude that TELRIC rates do not qualify as "just and reasonable" rates; while we might ultimately approve higher rates, we cannot do so without the benefit of a record or the agreement of the parties. We note that the decision we reach today is consistent with the approach embodied in the FCC's Interim Rules, which require a six-month moratorium on raising wholesale rates.

Order at 19-20.

On September 15, 2004, GWI sent an e-mail to the RRPT and Verizon requesting, based on the Commission's September 3, 2004 Order, that its RRP complaint be re-opened and a decision be entered in its favor. On September 20, 2004, Verizon filed a Supplemental Reply to GWI's complaint arguing that the Commission's Order did not impact the decision on GWI's complaint. Specifically, Verizon argued that until the Commission approved a wholesale tariff, its dealings with GWI were governed by the Interconnection Agreement, which was not impacted by the Commission's Order in the Wholesale Tariff proceeding and that it would be both premature and improper for the RRPT to resolve the specific pricing issues raised by GWI's complaint. Further, Verizon alleged that even if it were obligated by Section 271 of the TelAct to provision OC-3 UNEs, the FCC had specifically rejected the use of TELRIC rates for Section 271 UNEs, and thus it was entitled to charge special access rates.

The RRPT reviewed the relevant portions of the Interconnection Agreement, the TelAct, FCC orders, and our orders and determined that this matter required full Commission consideration.

III. INVESTIGATION

We open this investigation to resolve the legal issues presented by GWI's RRP complaint. We preliminarily find that this matter is limited to legal interpretation questions and does not require an evidentiary proceeding. Because this investigation arose out of a RPP complaint between GWI and Verizon they are hereby granted party status in this docket. As this question is very closely related to the wholesale tariff and arbitration cases² we will also consider any party in those cases to be an interested party in this docket. Accordingly, we ask the parties, and invite other interested parties,³ to brief the following questions:

1. What impact does the FCC's August 20th Order and Notice of Proposed Rulemaking (Interim Order and Rules) have on this proceeding?
 - a. Specifically, do paragraphs 16 and 17 of the Interim Order require Verizon to continue providing OC-3 UNEs as dedicated transport for six months (until Feb 20, 2005)?
 - b. What price was in effect for OC-3s on June 15, 2004 under GWI's Interconnection Agreement?
 - c. Does the Interim Order supercede the parties' Interconnection Agreement?
2. Please identify and explain the significance of each provision in the Interconnection Agreement upon which you rely to support your position on GWI's complaint.
3. Does the lack of an existing wholesale tariff in any way limit the Commission's authority to order Verizon to continue providing Section 271 UNEs? At TELRIC prices?
4. Do the terms of GWI's Interconnection Agreement require it to file a request for arbitration with the Commission before we can reach a final decision on this matter?

² Docket Nos. 2002-682 and 2004-135.

³To assist other parties with their understanding of the specific issues raised by GWI, we will post redacted versions of the parties' written filings in the virtual case file for this proceeding.

- a. Has this issue already been raised in the Verizon Arbitration proceeding (Docket No. 2004-135)?
- b. Have the parties already met the 45-day negotiation period required by the Interconnection Agreement?

Dated at Augusta, Maine, this 30th day of September, 2004.

BY ORDER OF THE COMMISSION

Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
 Diamond
 Reishus

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.
2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within **21 days** of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Appellate Procedure.
3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.